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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 178

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE AS AUDITOR AND L. T. HALVORSON AS TREASURER OF BARNES COUNTY, ET AL., ALL OF THE STATE OF NORTH DAKOTA,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

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J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE as Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor, W. D. Conway as Treasurer and Bert M. Salisbury as Auditor-elect of Benson County; Ole Colbornson as Auditor, Sam H. Wilson as Treasurer, C. E. Hurst as Auditor-elect and Arlan Stair as Treasurer-elect of Bottineau County; H. F. Magedanz as Auditor, Jerry Donovan as Treasurer and Thomas P. Borgen as Treasurer-elect of Burke County; F. Ford Doherty as Auditor, C. A. Baumgartner as Treasurer and Paul H. Eddy as Treasurer-elect of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor, H. J. Oberman as Treasurer and Harry Bjornstad as Treasurer-elect of Dickey County; R. H. Lynch as Auditor, O. A. Steffler as Treasurer, Myrtle Skabo as Auditor-elect and Albert T. Heide as Treasurer-elect of Divide County; S. W. Lyman as Auditor, Hugh Peoples as Treasurer and S. K. Haugland as Auditor-elect of Eddy County; J. B. McWethy as Auditor, M. P. Roberts as Treasurer and Alice Cole as Treasurer-elect of Foster County; Martin O. Haugen as Auditor, John Sandbek as Treasurer and Albert Brenna

as Treasurer-elect of Grand Forks County; P. A. Melgard as Auditor, R. J. Howden as Treasurer, R. J. Howden as Auditor-elect and H. B. Nelson as Treasurer-elect of Griggs County; E. W. Olson as Auditor and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor, Oluf Erickson as Treasurer and O. M. Fritsvold as Treasurer-elect of McKenzie County; F. J. Haines as Auditor, Nels Hofland as Treasurer, M. L. Glarum as Auditor-elect and Sadie Hofland as Treasurer-elect of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor, J. H. Hannesson as Treasurer and Norval W. Hodgson as Treasurer-elect of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor, W. C. Budke as Treasurer, W. E. Coutts as Auditor-elect and Einar Johnson as Treasurer-elect of Renville County; George J. Fischer as Auditor, Karl L. Mikkelson as Treasurer and Einar Vohnson as Treasurer-elect of Richland County; Jas. H. Penny as Auditor, Allister McKay as Treasurer and E. M. Anderson as Treasurer-elect of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. J. Mustad as Auditor, Florence Carlson as Treasurer and Ella B. Johnson as Treasurer-elect of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson, as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mor-

tenson as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

STATEMENT OF THE CASE.

The Statement of the Case set forth in the brief of the petitioner is, perhaps, sufficient to inform the Court as to the contentions of the appellant, but since it makes no pretense of setting forth the general nature of the case and the broad issues involved, it seems necessary for us to present such a statement in this brief.

The action involves the 1933 taxes of the Great Northern Railway in the State of North Dakota. The Great Northern Railway appeared before the State Board of Equalization meeting and asked that its 1933 assessment be fixed at an amount not in excess of $60,000,000 (Dft's. Ex. Z-2, R. 295, 300). The State Board fixed the assessment at $78,832,888. The total tax levy upon this assessment was $1,508,352.34.

Petitioner now contends that the assessment exceeds the true value by 43%, but has paid 60% of the taxes levied, and a temporary injunction was issued against the enforcement of the remaining 40%, upon the payment of the 60% admittedly due. This payment was upon the basis of an assessed value of approximately $47,000,000, some $13,000,000 less than the valuation asked of the State Board. Reduced to taxes, it represents a payment of nearly $300,000 less than would have been paid upon the basis of the $60,000,000 assessment requested by the petitioner when it

appeared before the State Board.

The action was dismissed in the trial court, but the temporary injunction has been continued in force pending the appeal to the Circuit Court of Appeals and the application for a writ of certiorari to this Court.

The evidence submitted by the petitioner at the trial consisted of expert testimony calculated to establish the proposition that the assessment was in excess of the true value of the North Dakota by 43% or more. Such evidence was based entirely upon calculations and formulae never before used in tax cases, and upon evidence which had not been submitted to the State Board (R. 85). They were prepared by Mr. Turnburke, a man who has never appeared before a tax commission, does not know who has appeared for his railroad, and does not know what basis was used for arriving at valuations by those who did appear for the railroad (R. 129). Though Mr. Schoettler, petitioner's assistant right of way, land and tax commissioner, the railroad's representative at the hearing before the State Board, was called as a witness by the railroad, he did not give one word of testimony in support of the formula developed by Mr. Turnburke, but his testimony was closely confined to other matters (R. 79). The figures contended for by Mr. Turnburke were not prepared until long after the meeting of the State Board, and were not presented to the State Board of North Dakota or any other state (R. 129).

The evidence submitted by the respondents was limited to the expert testimony of the witness Baker, based upon the financial and operating statistics of the railroad (R. 183, 291). His testimony disclosed that the State Board of Equalization of the State of North Dakota is required by law to exercise its judgment as to values, and is not permitted to substitute arbitrary formulae for that judgment;

that the state tax commissioner and the railroad tax officials have always prepared computations for the assistance of the State Board, which computations have been based upon widely varying formulae, which have produced widely varying results; that the State Board has considered all the evidence before it and then exercised its judgment as to the true value. It has never adopted any formula for the determination of railroad values, but has always exercised its judgment as required by law. Mr. Baker also discussed at length the various theories used by experts in determining railroad valuations, and his testimony establishes the proposition (concurred in by Mr. Schoettler, the railroad's tax expert, at page 86 of the record) that the assessment of railroad property is not an exact science, that there is no uniformity in methods for determining railroad values, and that all formulae are unreliable. Defendant's detailed exhibits, particularly Exhibits P, Q. R. S and T (R. 277-279, 281-283-285) disclose the results of the application of the various formulae in common use to the statistics of the Great Northern Railway.

The members of the State Board were not called as witnesses by either party, and there is no evidence as to what figures, facts or formulae were considered by the Board at its meeting at which the assessment in question was fixed, save and except that the brief presented to the Board by the Great Northern is in evidence, and this brief discloses that the railroad then contended for an allocation of the system value to the State of North Dakota by the use of the very allocation factors which it most bitterly assails in this action (Ex. Z-2, R. 295).

Upon consideration of the evidence the trial court found the facts to be as contended by the State; that the assessments for the years 1929, 1930, 1931 and 1932 were each

and all lawful and justified, and that there was no evidence (other than certain evidence offered to show that the assessment was in excess of actual value) that the 1933 assessment was fraudulent or made with intent to defraud the plaintiff, or that it was made by any unlawful or improper method or in violation of any legislative mandate (Findings of Fact, R. 51, 52).

The trial court made no finding as to the true value, or as to whether or not the assessment was excessive, for the reason that no fraud, actual or constructive, having been shown, the Court felt it was unnecessary and improper for it to attempt to fix the true valuation, that being the function of the State Board of Equalization.

Petitioner's Statement of the Case is limited to a statement of its conclusions as to the result of some specific phases of the evidence, which it appears necessary to explain. We will explain briefly.

(a) Excessiveness of the Assessment Not Admitted.

Respondents do not, and never have, admitted that the assessment is excessive. The Answer first sets forth in paragraph E (R. 24) that the statutes of the State do not permit the use of mathematical calculations for determining railroad values, and that though some of the formulae used by experts do, in normal times, have some evidentiary value, under present conditions these formulae have lost much of their value, and that the State Board has never adopted any formula. Then, in paragraph I (R. 28) in answer to complainant's contention that the physical property factor of allocation is the only reasonable basis for distribution of the system value among the states, the State alleges on the contrary that the best and most accurate sys-

tem involves the use of all five factors, rather than any one or other number less than five. But the allegation does not by any means admit that the use of the five factors of allocation will produce a mathematically exact solution to the question of the value of the railroad. In fact, even if it did constitute such an admission, the allocation of the system value is only one step in the calculations of the experts—the most important step, the valuation of the entire system, is not involved at all. And the so-called "admission" or "confession" of Mr. Baker is simply this answer, given on cross examination: "I believe it is correct that schedule 4 on Exhibit P showing the five factor ratio is the one which is advocated by the state as the fairest basis *of allocation*" (R. 189).

Mr. Baker also testified (R. 206), "As to my statement that the excess in the 1933 assessment over the results produced by any of these tables operated to some extent to condemn the 1933 assessment, I will say that the very best statistical evidences of value are not definite proof of value and there were a number of peculiar and extraordinary circumstances for the Board to consider in 1933 that are not in any way indicated by statistical exhibits. I do not feel that variance from the results produced by my tables present an absolute showing of a wrongful assessment on the part of the State Board."

Thus is reduced to an absurdity any contention that the State has admitted an over-assessment of 24.52%. We frankly admitted that the *formulae* used by tax experts would not justify the assessment; but the whole record made by the State, both in the pleadings and the evidence, constitutes a direct and categorical denial that the results of these formulae furnish any reliable test as to the accuracy of the assessment.

(b) No Factors in the 1932 Assessment Making Its Adoption for 1933 Unlawful.

Petitioner's statement upon this point would make it appear that there is some evidence in the record that the Board used a five year period for the determination of earnings and stock and bond values both in 1932 and 1933. As a matter of fact, and this cannot be too strongly urged, there is not one word of evidence in the entire record as to the use of any period, any method, or any formula. The petitioner alleges the Board used various combinations of figures; the Answer denies the use thereof, and says the Board simply considered all evidence, computations and matters of common knowledge before it, and then used its judgment. Not one word of evidence is submitted by the petitioner to show what the Board used, either in the matter of the period over which the stock and bond values or earnings should be averaged, or the factors used in allocating system value to the State. The burden of proof was on the petitioner, and it did not see fit even to attempt to sustain that burden.

In petitioner's statement, much is made of the prophecies of Mr. Beidelman and Mr. Turnburke as to the dark future of the railroad. These prophecies were not submitted to the State Board, and the State Board was never given the opportunity of considering whether or not the assessment should be reduced by reason thereof. See Exhibit Z-2, R. 295, which is the only evidence or contention made by the railroad before the State Board.

(c) No Proof That Mileage Prorates Were Actually Used in Making the Assessment.

Petitioner contends that the Answer does not deny and therefore admits that mileage prorates were used in allocating system value to North Dakota. It is true that the defendants did not deny paragraph IX of the Complaint as fully as might have been done, but the Answer does fully and completely deny that *any* formula was used by the Board, and alleges that any use thereof by the Board as the final and conclusive determinator of value would have been in violation of the statutory duties of the Board. See, particularly, paragraph E of the Answer (R. 24). This contention is completely answered by the opinion of the Circuit Court of Appeals at page 312 of the record, that we will give it no further notice.

As to proof, Exhibit P, Schedule 4 (R. 277), shows that the use of the criticised method of allocation of system value would not in *any* year have produced the assessment complained of, as the assessment was 5.41% higher than the computed value in 1929; .18% lower than the computed value in 1930; .41% higher than the computed value in 1931; 4.29% higher than the computed value in 1932; and 24.52% higher than the computed value in 1933. When the use of a system or formula produces variations from the assessment of 5.41%, .18%, .41%, 4.29% and 24.52% in as many years, it quite clearly appears that the formula was not used in making the assessment. The contention is well answered by the Circuit Court of Appeals thus: "* * * it is clear that the proof of the *fact* that the Board used the above five factor method is based on the *conclusions* that because the Board's assessments for several years before 1938 were not far from what would have resulted by

the use of that method, and because the assessment of 1933 was the same as for 1932, it must follow that such method was carried into the 1933 assessment. But the 1933 assessment is appreciably above the result which would have been reached by applying such method. No member of the Board was a witness. No witness pretended to know all that the Board might have considered. * * * We think appellant has failed to establish that the Board was guided by or was largely influenced by the use of any particular method and, therefore, is in no position to urge the contention that property outside the State has been brought into this assessment" (R. 313).

Petitioner has great difficulty in distinguishing between the State Tax Commissioner and the State Board of Equalization; and the same difficulty in distinguishing the testimony of the witness Baker as to his opinion concerning the proper factors for consideration, from evidence as to what the Board actually considered. The record is clear that the Tax Commissioner made computations for the assistance of the Board, but the Board never adopted these computations. It considered them and the computations presented by the railroad and all other matters before it, and then used its honest judgment.

(d) Facts Which Justify Assessment in Excess of the Results of Formulae.

The effect of the depression upon the reliability of statistical formulae is not mentioned in petitioner's brief. Stock and bond prices during the years in question were a matter of panic psychology, not of sound judgment of investors as to values. As an illustration, the Dow-Jones & Company averages of thirty industrial stocks fell from 383.17 in Sep-

tember, 1929, to a low of 41.22 in July, 1932, and the average of twenty rails fell from 189.11 in September, 1929, to 13.23 in July, 1932. The total market value of all common and preferred stocks listed on the New York Stock Exchange fell from eighty-nine and a half billion dollars in September, 1929, to fifteen and a half billion dollars in July, 1932 (R. 147). These figures indicate the utter unreliability of market price of stocks and bonds as an indicator of actual value of the underlying property.

With reference to the Great Northern stock, Exhibit C (R. 253) gives a complete picture of the history of Great Northern stock for the 17-year period prior to the assessment date. The 17-year period is used, for the reason that it is the period within which the stock would have earned $100.00, had its annual return been 6%. The exhibit shows the stock actually earned $131.39 in these seventeen years, and actually paid $92.25 in dividends. The corporate surplus increased from $106,000,000 to $149,000,000 in 1933. In the five years preceding the assessment year the stock had earned $10.11 in 1928, $10.31 in 1929, $7.25 in 1930, $2.14 in 1931, and nothing in 1932. During the same five years, dividends of $5.00, $5.00, $7.50, $2.50 and nothing had been declared. Thus in the preceding five years stockholders had received actual cash dividends of $20.00—yet the average market price for 1932 was only $13.20. This Exhibit C, together with the explanation thereof at page 157 of the record, is convincing evidence that the results of any formula based in any part upon stock prices were not to be trusted in 1933.

During the months of May, June and July, 1933, immediately preceding the assessment, we were in the middle of a boom, and there had been a tremendous upward trend in the stock and bond market. There was a very sharp rise in

Great Northern stock at that time (R. 207).

The assessment of general property in North Dakota has not been reduced in conformity with the drastically decreased economic return from property, and could not be so reduced without so drastic a reduction in revenues as to endanger the continuance of the functions of government. The mere fact that the securities representing a certain class of taxable property are quoted on the market, and its earnings are readily available should not entitle that class of property to preferential treatment. Farm property constitutes about 65% of the total taxable value in North Dakota. The economic return from such property has decreased about 75% as compared with the 1924-1928 average. There has been no net return on the investment (R. 149).

In 1932, the last year prior to the assessment date, the North Dakota mileage of the Great Northern carried 378,498 revenue ton miles of freight per mile of track operated, while the entire system carried only 358,909 revenue ton miles of freight per mile of track operated, which, reduced to percentages, shows that the North Dakota mileage carried 105.46% of the system average (Exhibit J).

The average net operating revenue per mile of track for the eight years preceding the assessment date was $3,013 for North Dakota, and but $2,816 for the system. The operating ratio, that is, the ratio of operating expenses to operating revenues, was 62.44% for North Dakota, and 67.71% for the system (Exhibit L).

Since 1918, when the valuation of the Great Northern was fixed by the United States District Court, there have been the following changes in the assessed value of the Great Northern: 1919, 4.08% reduction; 1922, 5% reduction; 1929, 1.25% increase; 1931, 0.35% reduction; 1932, 5% reduction; 1933, 0.02% reduction. Since the 1917 assess-

ment the total reduction in assessed value has been $19,661,884, or 19.96%. Since the 1919 assessment the total reduction has been $7,770,442, or 8.97% (Exhibit O).

Other material facts will be developed in the course of the argument.

ARGUMENT.

I. Introduction and Brief Reply to Points Relied Upon by Petitioner.

We regret that it is impossible for us to follow the outline used in petitioner's brief in presenting our case, for the reason that the petitioner has devoted itself so largely to a discussion of evidence not before the Board of Equalization and a formula for allocation of system value to States which is new and untried and unvouched for by any Court or tax authority, that the picture is entirely out of focus.

We apprehend that in a case such as this, the question at issue is whether or not the assessment made, viewed as a whole, is in an amount which reasonable men, acting honestly in the performance of their official duties, in view of the evidence before them and all matters within their common knowledge, might have concluded to be the actual market value of North Dakota's share of this interstate railroad.

Little or no attention is directed to this fundamental question in petitioner's brief, but extended attention is given to such questions as whether or not the 1933 assessment was the same as that in 1932; whether or not the use of five years' earnings and stock and bond prices to determine system value was admitted in the pleadings or proven in the evidence; whether or not the use of mileage prorates was admitted or proven, and similar questions. The funda-

mental questions—whether or not the Board failed to follow the statutory mandate as to the method of assessment, and whether or not the Board was guilty of fraud, actual or constructive—are largely ignored.

However, in order that the Court may be advised of our answer to the specific points raised by petitioner, we submit the following brief answers to the several points in petitioner's brief:

"Point A. The adoption of a prior year's assessment for 1933, the use of five years' earnings and stock and bond prices to determine system value and the apportionment of system value to North Dakota by the use of mileage prorates were not only proven but were specifically admitted by the pleadings." We flatly deny that the pleadings or the evidence establish that the Board used the five years' earnings period and stock and bond prices to determine system value, or that the Board apportioned the system value to North Dakota by the use of mileage prorates. The evidence and the pleadings are analyzed in connection with this point at page 6 of this brief. The opinion of the Circuit Court of Appeals squarely answers this contention of petitioner (R. 312).

"Point A-1. The precise amount of the 1933 assessment was fixed by that of the 1932 assessment, which was adopted for 1933." We admit that the precise amount of the 1933 assessment was the same as that fixed in 1932, after subtracting a small amount for trackage removed.

"Point A-2. The amount of the 1932 assessment as originally made and, therefore, as adopted in 1933, was determined from earnings and stock and bond prices of the years 1927 to 1931 and by the use of mileage prorates of system value." We deny that the evidence or the pleadings show that the amount of the 1932 assessment as originally made

was determined from earnings and stock and bond prices for the years 1927 to 1931, and by the use of mileage prorates of system value. Petitioner has not pointed out one word in either the pleadings or the evidence which shows what method was used by the Board in determining the assessment either in 1932 or 1933. No witness testified as to what was the basis for the Board's conclusion. The evidence referred to at page 10 of this brief discloses that the use of the criticised formula for determining value would not have produced the amount of the assessment in any year of the five years covered by the exhibits.

"Point B. In basing the assessment upon earnings and stock and bond prices of 1927 to 1931, the Board was in effect assessing values of an obsolete period which were no longer in existence in 1933." This point assumes that the assessment was based upon earnings and stock and bond prices for 1927 to 1931, and then charges that the effect thereof was to assess values of an obsolete period. Aside from the fact that there is no evidence that this assumption is justified, the five-year averages had always been used in the past, and were never objected to by the railroad until the bottom of the depression was reached. Stock and bond prices of the three years immediately preceding the assessment date were no evidence whatever of value, being based purely upon panic psychology. Prices immediately preceding the fall of 1929 were likewise unreliable, being based upon boom psychology. The only way an air of respectability can be given at all to stock and bond prices is to average them over a sufficient period of years to iron out the depressions and the booms.

"Point C. Of the total amount of the assessment, approximately $20,000,000 was levied against properties outside of the State and beyond its jurisdiction." This argu-

ment proceeds upon the theory that the value of a going railroad should be allocated among the States solely upon the basis of physical property values. This has never been the law with reference to the allocation of system value of a railroad. Much testimony was given concerning the weight of rails in North Dakota and elsewhere on the system, the number of bridges within and without the State, the terminals within and without the State, etc. But none of this evidence was before the State Board. Neither was the novel method of allocation suggested by Mr. Turnburke before the Board. The only thing shown to have been before the State Board, astonishingly enough, is a brief of the railroad, wherein the allocation of system value to North Dakota is accomplished by the very method so hotly criticised in petitioner's brief. Petitioner's tax department, in briefing its case for the State Board, did not even use the physical property factor as one of several possible factors of allocation—it completely ignored the contention which is now made. See Exhibit Z-2 at R. 298.

"Point C-1. The North Dakota trackage consists largely of relatively cheap branch lines. The more valuable terminals and more costly mountain construction are located outside the State." The evidence relied upon to establish this proposition was not before the State Board, and it had no opportunity whatever to consider the same.

"Point C-2. The outside terminals and costly mountain construction, while concentrated in short mileage, contribute as much to transportation service and to system value in proportion to cost and value of plant as do the cheaper portions of the road where the same investment is spread over more miles." The evidence relied upon to establish this proposition was not before the State Board, and it had no opportunity whatever to consider the same.

"Point C-3. The right to assess and tax each portion of a railway system belongs solely to the State where that portion is located." The truth of this proposition is granted, if coupled with the statement that terminal values and mountain construction actually located in other States do enhance the value of property in other States of the same railroad system, and that the same must be taken into consideration in valuing any part of the system.

"Point D. Where the use of unlawful methods by the taxing officers has been shown, it is not incumbent upon the taxpayer to submit a proper method of computation or to prove the correct amount that is due." We insist that no evidence shows the use of *any* particular method by the State Board, and that even if the use of an improper method were shown, it would also be incumbent upon the railroad to show that the use of such a method actually resulted in fraudulent over-assessment.

"Point E. Even assuming that no wrongful methods were shown and that there was no evidence whatever as to what methods were used, the facts that the assessment is treble the current value of the property and that the defendants confess their inability to justify it by any rational process are sufficient to prove arbitrary action." Of course, the contention that the assessment is treble the current value of the property is based wholly upon facts not before the Board, and conclusions of a rate expert (not a tax expert) which were prepared solely for use in this case, after the assessment was made, and which had never before been heard of anywhere. The railroad's brief before the Tax Commission asked for an assessment "not in excess of $60,000,000" (R. 300). Tables submitted by the railroad and before the Board produced valuations as high as $64,814,280 (R. 301). The assessment was $78,832,888. The defendants did not

"confess" inability to justify the assessment by any rational process. True, the defendant's expert witness did admit frankly that he knew of no *formula* which would produce the amount of the assessment. But the Board was not at liberty, under the statute, to substitute any formula for its honest judgment. The evidence does disclose that any and all customary statistical formulae were wholly unreliable as indicators of value during such times as existed in 1933. There was ample support in the evidence and in the Board's common knowledge of the condition of the times for the judgment announced by the Board.

"Point F. The economic emergency does not justify the violation of the statute requiring the assessment of property at its full and true value in money." We do not deny this proposition, but we do insist that the economic emergency has thrown all tests of value out of gear, and that a board should not be charged with fraudulent over-assessment when it refused, in such circumstances, to give full credence to depression stock market reports, etc., as absolute tests of market value, and we do insist that the Board should be given a little more latitude for errors in judgment at times like these, when anyone's judgment of the value of anything is little more than guess-work, than during normal times.

Most of the above brief answers to petitioner's "Points Relied Upon" will be elaborated in the course of the discussion which follows, in which we will attempt to analyze the assessment as a whole in the light of the law and the evidence.

II. Points Relied Upon by Respondent.

A. Federal Courts Should Interfere With Administration of State Taxing Power Only in Extreme and Aggravated Cases.

B. Federal Courts Will Enjoin Collection of State Taxes Only When Assessed in Violation of Legislative Mandate, or When Computed by Erroneous Principles Resulting in Gross Over-Assessment or Taxation of Out-of-State Property, or When the Assessing Board Is Guilty of Fraud, Actual or Constructive.

C. The Board Did Not Fail to Follow Any Legislative Mandate.

D. The Assessment Was Not Computed by Any Erroneous Principle Resulting in Over-Assessment or Taxation of Out-of-State Property.

1. The finding of the trial court that there is no evidence of the use of a wrongful method by the Board should not be disturbed.

2. Even assuming the method criticised by petitioner was used by the State Board, it is not an improper method.

   (a) The use of a five year period for determining stock and bond values and for averaging capitalized net earnings is not unreasonable.

   (b) The use of the five-factor method of allocation of system value does not result in the taxation of out-of-state property.

   (c) The facts upon which petitioner relies to show

unfairness in the criticised method were not before the State Board, and the railroad, itself, actually used the criticised method before the State Board.

E. THE ASSESSING BOARD WAS NOT GUILTY OF FRAUD, EITHER ACTUAL OR CONSTRUCTIVE.

1. It is admitted that there was no actual fraud.

2. The Board was not guilty of constructive fraud.

(a) The 1933 assessment was not grossly excessive.

(1) The Turnburke theory as to the proper basis for taxable value is not sound.

(2) Assessment of interstate railroads is not an exact science, and all formulae are mere approximations of actual value.

(3) Use of the standard methods of allocation of system value to the State of North Dakota produces results approximating true value.

(4) The State Board was justified in leaving the 1932 assessment unchanged in 1933.

(5) Assuming the 1933 assessment to have been erroneous in amount, the error is not one which the Court should attempt to correct.

(6) Even if there was an over-assessment for 1933, it was not part of a continued practice of over-assessment.

F. PLAINTIFF HAS FAILED TO DO EQUITY.

A. FEDERAL COURTS SHOULD INTERFERE WITH ADMINISTRATION OF STATE TAXING POWER ONLY IN EXTREME AND AGGRAVATED CASES.

In this case the Court is asked to interfere with the exercise of the taxing power of a sovereign state, probably the most important power held by the State. Even in normal times, the Courts are extremely reluctant to place a restraining hand upon the administrative branch of the State charged with the exercise of this essential function of government.

> "It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. There must be a clear and affirmative showing that the difference is an intentional discrimination and one adopted as a practice."
>
> *Chicago, G. W. R. Co. vs. Kendall*, 266 U. S. 94.

> "The board was created for the purpose of using its judgment and its knowledge. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *State vs. Savage*, 65 Neb. 714, 768; *In re Cruger*, 84 N. Y. 619, 621; *San Jose Gas Co. vs. January*, 57 Cal. 614, 616. Within its jurisdiction, except, as we have said, in case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end."
>
> *Chicago, B. & Q. R. Co. vs. Babcock*, 204 U. S. 585.

> "At the most there have been errors of judgment;

and mere errors of judgment are not subject to review in these proceedings. *Pittsburg, C. C. & St. L. R. Co. vs. Backus,* 154 U. S. 421, 38 L. Ed. 1031, 14 Sup. Ct. Rep. 1114; *New York ex rel. Brooklyn City R. Co. vs. New York,* 199 U. S. 48, 52, 50 L. Ed. 79, 85, 25 Sup. Ct. Rep. 713."

Southern R. Co. vs. Watts, 260 U. S. 519.

"The power of assessment, vital though it be, must be lodged somewhere. In Kansas, and generally, it is lodged in the administrative branch of the government, and not the judicial. Mistakes will be made, whether the valuation be made by a Commission, a jury, or a court. Courts therefore do not supervise the actions of assessing bodies, nor sit to correct their errors of judgment. Where the assessing body has failed to follow a legislative mandate, or where it has pursued a systematic course of intentional discrimination, or has been guilty of fraud, or arrived at value by the use of fundamentally erroneous principles, recourse may be had to the courts. But proof of mistake or inequality is not enough."

Pleasant vs. Missouri-Kansas-Texas R. Co. (C. C. A.), 66 F. (2d) 842, 845.

This being true in normal times, how much more true it is in times like the present, when values which have been more or less stable for a generation have rapidly melted away, and when if all assessments had been reduced to conform to actual "market value" the State and its subdivisions would have ceased to function, as the revenue would not even approximate necessary expenses (R. 149). We think, even were this proposition not supported by the evidence, the Court would be justified in taking judicial notice of the

exigency of the times, and of the fact that actual "market values" have been wholly incapable of ascertainment with respect to any class of real property and much personal property, because there have been no markets to establish any such value; that if property other than railroad property were to be valued in times like these by a stock and bond method, or a capitalization of earnings method, there would be vast classes of property having both a past and a prospective value, but no present value at all; and that unless the State Boards charged with the great responsibility of assessing property are to be allowed some freedom and latitude in the exercise of their honest judgment, State governments must necessarily fall of their own weight, without revenue to support them.

By the foregoing we do not mean to say that every assessment, no matter how excessive or fraudulent, should be permitted to stand. We mean to say, rather that the Courts should not, in times like these, open up any new avenues of attack upon assessments, as requested by petitioner, but should, instead, require the strictest proof that the assessing board has transgressed beyond the limitations prescribed by the previous decisions of this Court. And if the record discloses that the State Board fixed a valuation in excess of that which would be produced by the application of some of the standards of value generally used in normal times, the Court should remember that there have been no true standards of value of anything—that any computation or the application of any formulas to any financial or operating statistics to any business has been wholly unreliable—and that all men have bought and sold upon the market, not with considered judgment of actual values, but upon guess-work, speculation, hopes and fears. The State Board members, acting under their oaths of office, met; they considered the

evidence and the arguments submitted to them by the railroad; and thereafter they made their assessment. The presumption is that they acted lawfully and properly. The trial court found:

> "that there is no evidence in this case (other than certain evidence offered to show that the assessment was in excess of actual value) that said assessment was fraudulent or made with intent to defraud the plaintiff or that it was made by any unlawful or improper method or in violation of any legislative mandate" (Finding No. 9, R. 52).

We submit that the mere fact that the State Board's estimate of value may not accord with the estimates of other reasonable men, or of a court, should not invalidate their assessment.

The remainder of this brief will be devoted to an analysis of the evidence and the law, for the purpose of demonstrating that this Finding and the Judgment of the Court based thereon, is correct.

B. FEDERAL COURTS WILL ENJOIN COLLECTION OF STATE TAXES ONLY WHEN ASSESSED IN VIOLATION OF LEGISLATIVE MANDATE, OR WHEN COMPUTED BY ERRONEOUS PRINCIPLES RESULTING IN GROSS OVER-ASSESSMENT OR TAXATION OF OUT-OF-STATE PROPERTY, OR WHEN THE ASSESSING BOARD IS GUILTY OF FRAUD, ACTUAL OR CONSTRUCTIVE.

This case does not involve the constitutionality of a state statute. The state statutes have not been challenged. The petitioner contends, rather, that in the administration of the state law, the State Board of Equalization has violated the state law and has unlawfully over-assessed petitioner.

Therefore, it seems necessary that petitioner should fit its case into one or more of the grounds recognized by the Courts as a basis for interference with the taxing power of the sovereign state. An analysis of the cases would indicate that these possible grounds are three in number: (a) Failure to follow a legislative mandate, (b) Computation of the assessment by erroneous principles resulting in gross over-assessment or taxation of out-of-state property, and (c) Fraud, actual or constructive, on the part of the Assessing Board.

Failure to follow a legislative mandate, of course, vitiates the assessment because it is the legislative mandate which creates the assessing board and defines its powers and its duties, and any substantial deviation from the path marked out by the legislature renders the assessment void.

Computation of the assessment by erroneous principles, in itself, apparently is not enough to justify interference. It must also be shown that such erroneous computation resulted in either a gross over-assessment, or in the taxation of property beyond the limits of the State. For instance, in *Cleveland, C. C. & St. L. R. Co. vs. Backus*, 154 U. S. 439, the allocation of system values upon a mileage prorate was approved. In *Pittsburg, C. C. & St. L. R. Co. vs. Backus*, 154 U. S. 421, it was held that testimony that the value placed upon the property of a railroad company by the Board of State Assessors was excessive, together with testimony that portions of the road outside of the State were of largely greater value than any similar length of road within the State, unaccompanied with evidence that the Board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the State is not sufficient to impeach its de-

termination. In *Wallace vs. Hines*, 253 U. S. 66, the use of the mileage prorate was held improper and unlawful. It is obvious that if the use of the mileage prorate is an improper method of allocating the system value of a railroad to the States, it is improper in all cases. But where it produces results substantially correct, the Courts do not interfere. Such interference is justified only when it is made to appear that the improper method actually operates to tax property not within the borders of the State, or to result in a gross over-assessment.

We feel that the burden of proof, therefore, is upon the plaintiff to establish both the use of an improper method and that such improper method produced an unlawful result. Not one word of testimony appears in the record as to what method was used by the Board, and we insist that in this case there could be no room for a conclusion that the assessment is invalid because of the use of an improper method.

Petitioner complains that the rule announced in *Chicago, B. & Q. Ry. vs. Babcock*, 204 U. S. 585, to the effect that members of the Assessing Board should not be cross examined as to the operation of their minds in making an assessment, makes it impossible for the railroad to prove its allegation of the use of improper methods. Of course, petitioner ascribes to that case a prohibition against any examination of the members of the Board as to what was before it and what was considered—something quite different from a cross examination as to the "operation of their minds"—but even if the prohibition should be extended to preclude the calling of the members of the Board as witnesses, we fail to see how this protection, rightly given to State officers acting in the performance of their duties, should be held to shift the burden of proof to the defendant, and make it the duty of

every Assessing Board to prove its assessment was based upon proper methods, instead of the burden of the plaintiff to prove the use of improper methods. This is directly the opposite of the rule laid down in *Sunday Lake Iron Co. vs. Wakefield Twp.*, 247 U. S. 350.

True, such an interpretation as petitioner places upon the Babcock case would make it difficult for an objecting taxpayer to show that an improper method was used, but that is, in itself, a mere technical objection. If the Board actually was guilty of a fraudulent over-assessment, plaintiff can prove that without the necessity of any evidence as to what method the Board used.

Fraudulent over-valuation vitiates the assessment, because it deprives the taxpayer of his equal protection under the laws, and obstructs the taxpayer in his business of transporting persons and property in interstate commerce, in derogation of the powers of Congress. The Courts have held that a fraudulent over-assessment may be shown either by proof of actual fraud, or by proof of an over-assessment so flagrant as to shock the conscience of the Court and leave no room for any other conclusion than that the Board was actuated by fraudulent motives, by proof of a systematic course of intentional discrimination over a period of years.

Bearing in mind that the good faith of tax officials and the validity of their actions are presumed, and when assailed, the burden of proof is upon the complaining party (*Sunday Lake Iron Co. vs. Wakefield Twp.*, 247 U. S. 350), we will consider the challenged assessment in the light of each of the accepted grounds for injunction in the Federal Courts.

C. The Board Did Not Fail to Follow Any Legislative Mandate.

The constitutional and statutory provisions fixing the powers and duties of the State Board of Equalization of North Dakota are set forth in the Appendix. No method of determining the amount of the assessment is fixed by the statutes. The Board is simply required to assess the property and franchise of the railroad at "its true and full value in money."

In the absence of any statute defining the method to be followed in determining the true and full value in money, we take it to be the law that the method to be followed and the details thereof will be left to the discretion of the Assessing Board. The Court may find other grounds upon which to set aside an assessment, but so far as the statutory mandate is concerned, that has been complied with when the Board has exercised its judgment upon the evidence before it. In the case of *Illinois Central R. Co. vs. Greene*, 244 U. S. 555, many of the same questions raised here were presented by that railroad, but this Court said:

> "The first three points relate to valuation, the last to apportionment. The district court properly held that the action of the Board must be sustained unless it was made to appear that they had adopted a fundamentally wrong principle, or had been guilty of fraud. It held further, that no fundamentally wrong principle was involved in determining whether such a railroad system should be valued on the capitalization-of-income, or the stock-and-bond plan; or, if the former, what rate of interest should be used in capitalizing, or how many years' earnings should be considered, or what was in fact the amount of net income for a given year; or, if the stock-

and-bond plan was adopted, what was the value of the stock and bonds; and that on these and similar matters the action of the Board, in the absence of fraud, was binding upon the court. In this we concur."

Again, in the recent case of *Rowley vs. Chicago & N. W. Ry. Co.*, 293 U. S. 102, this Court said:

"The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property."

D. THE ASSESSMENT WAS NOT COMPUTED BY ANY ERRONEOUS PRINCIPLE RESULTING IN OVER-ASSESSMENT OR TAXATION OF OUT-OF-STATE PROPERTY.

1. *The Finding of the trial court that there is no evidence of the use of a wrongful method by the Board should not be disturbed.*

In the first place, as hereinbefore stated, there is not one word of evidence as to what method or principle was followed by the State Board in making its assessment. The plaintiff has wholly failed to sustain its burden of proof, or to offer *any* proof whatever as to the method followed by the Board. Petitioner's contentions in this connection are so well answered by the opinion of the Circuit Court of Appeals in this case that any further argument on our part would be superfluous. We quote the following language from that opinion (found on page 313 of the record):

"* * * it is clear that the proof of the *fact* that the Board used the above five factor method is based on the *conclusions* that because the Board's assessments for several years before 1933 were not far from what would have resulted by the use of that method, and because the assessment of 1933 was the same as for 1932, it must follow that such method was carried into the 1933 assessment. But the 1933 assessment is appreciably above the result which would have been reached by applying such method. No member of the Board was a witness. No witness pretended to know all that the Board might have considered. * * * We think appellant has failed to establish that the Board was guided by or was largely influenced by the use of any particular method and, therefore, is in no position to urge the contention that property outside the State has been brought into this assessment."

Great Northern R. Co. vs. Weeks, 77 F. (2d) 405.

Add to the above the fact that the formula or method to which the plaintiff objects in this case would not have produced the assessment in any of the five years covered by the exhibits, but would have produced variations from the assessment of 5.41%, .18%, .41%, 4.29% and 24.52% in as many years (see Exhibit P, R. 277) and the fallacy of petitioner's position is obvious.

Petitioner argues that the case of *Pennsylvania Railroad Co. vs. Jacoby & Co.*, 242 U. S. 89, is authority for the proposition that the State Board must have used the method objected to, because the assessment so nearly approximates the result which would have been reached had the method been used in 1932.

Aside from the fact that in the Jacoby case the Commis-

sion's result was precisely, to the dollar and cent, the result which would have been produced by the rejected method, whereas in the instant case the discrepancy was 4.29% in 1932, the Jacoby case goes no further than to say that "the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury."

Here, of course, there was no jury. The Court was the trier of the facts. The issue was presented to the Court in the evidence, and was extensively argued by counsel at the hearing in the District Court. Upon all the evidence, however, the Court expressly found "that there is no evidence in this case (other than certain evidence offered to show that the assessment was in excess of actual value) that said assessment was fraudulent or made with intent to defraud the plaintiff or that it was made by any unlawful or improper method or in violation of any legislative mandate" (Finding No. 9, R. 52). The Court also expressly found "That at no time within the past ten years has the State Board of Equalization adopted any specific or definite formula or method of calculating the value of the railroads operating in the State of North Dakota, but the State Board of Equalization has at all times had before it, at the time of making such assessments, tables and formulas prepared by the railroads and the office of the tax commissioner of the State, and has considered the same in arriving at its assessments, but never has adopted the exact result of any of said tables, formulas or methods of computation of railroad valuations" (Finding No. 6, R. 52).

These findings are amply supported by the evidence. In addition to the fact that no witness testified to any knowledge of what method the Board used in 1933, the evidence

discloses that for the year 1932 and four preceding years the assessment was never in an amount which would be the result of any of the formulas used, and also that during the years Mr. Baker was deputy tax commissioner (prior to 1933) there were two classes of evidence presented to the Board, that presented by the tax commissioner and that presented by the Railway Company, and the State Board gave such weight to the data as in their judgment it was entitled to, and that Mr. Baker could not give any testimony as to just what weight was given to the evidence presented to them (R. 188). This is absolutely all there is in the record with reference to the question of what method was adopted by the State Board, and it seems to us that it amply supports the conclusion of the trial court.

> "As to the terminals, the district court held that since it did not appear but that the Board had made due allowance on account of them, it must be presumed that they did make such an allowance. As to the treasury securities, the court held that plaintiff had not made an adequate showing to the Board of Valuation and Assessment; that it did not appear but that the Board had given proper consideration to them; and that plaintiff had not put the court in possession of the evidence upon which to determine whether the securities were a part of its 'unit,' or why the securities were held by plaintiff instead of being distributed to the stockholders. * * * In criticism of the conclusions of the court upon these and some other points, a most elaborate argument is submitted; but we see no sufficient ground for disturbing the decision."
>
> *Illinois Central R. Co. vs. Green*, 244 U. S. 555.

So much for the question of whether or not there is any

evidence to support petitioner's contention that the 1932 assessment was arrived at by the use of unlawful or improper methods.

As to the 1933 assessment, we admit that the fact that the 1933 assessment is identical with that of 1932, makes it appear that the Board simply adopted the 1932 assessment. But if we assume, as we should assume, that the 1932 assessment represented the actual value of the railroad, does it necessarily mean that the Board followed some improper method in taking the same figure for 1933? The statute does not permit the Board to base its conclusion strictly upon the result of some arbitrary statistical formula—to substitute tables and calculations for the judgment which it is required to exercise. The Board, as reasonable men, had common knowledge of the fact that the year 1932 was the very bottom of the depression, and under the tables ordinarily used by so-called tax-experts, the stock and bond values of the previous year are the last to be considered. They knew, as all reasonable men must know, that there was no market for any railroad, nor for countless other things they were required to assess. They knew that in such times all standard tests of value, built up for use in normal times, had failed, and that no man was competent to judge the true value of anything—that any valuation made by anyone anywhere during those times, was a little more than a guess, and a hazardous guess at that, because based on hopes and fears and speculation and panic psychology. Must it be said, then, that it was improper for the Board to conclude, after listening to the evidence and giving full consideration to all matters before it, and all matters of common knowledge, that the railroad had not changed much, if any, in value during the previous year, that its tracks and its depots and its trains were still there, and that its true value could be determined more

fairly by taking the previous year's assessment than in any other way?

2. *Even assuming the method criticised by petitioner was used by the State Board, it is not an improper method.*

Petitioner's chief attack is directed against the method of computing value advocated by the State's witness, Mr. Baker, and concerning which he testified, "I believe it is correct that schedule 4 on Exhibit P showing the five factor ratio is the one which is advocated by the state as the fairest basis of allocation." This, of course, is only the statement of the belief of an expert witness testifying on behalf of the State, to the effect that he believes this method is that which the State is contending, in this action, to be the fairest method. Naturally, his conclusion that this represents our contention in the case, does not in any manner constitute evidence that this is the method adopted by the State Board, nor negative the right of the Board to have based its decision on other tables or formulas or evidence considered by it to be more fair.

However, this is the method of computation to which so much complaint is made by the petitioner. In brief, it works out the valuation as follows (see Schedule 4, Exhibit P, R. 277):

First, the system value of the operating property of the railroad is determined by the average stock and bond value over a five year period (less value of non-operating property). Next, the system value of the operating property is determined by the net railway operating income (five year average) capitalized at six per cent. These two results are averaged, to produce a composite system value based 50% on stock and bond values and 50% on capitalized earnings.

This composite system value is then allocated among the States on what Mr. Baker calls a "five-factor basis of allocation." The five factors averaged for this purpose are: (1) all track mileage, (2) physical property (I. C. C. valuation plus additions and betterments, less depreciation), (3) ton and passenger miles, (4) car and locomotive miles, and (5) gross earnings. The last three items he designates as the "use factors." North Dakota's percentage of all track mileage, physical property, ton and passenger miles, car and locomotive miles and gross earnings, having been determined, these five percentages are averaged together, to produce Mr. Baker's composite allocation factor. The composite allocation factor is then applied to the composite system value, to produce the value of North Dakota's share of the railroad.

Petitioner challenges the propriety of this method on two principal grounds: First, that the period used for determining stock and bond values and capitalizing earnings is too long, and results, in 1933, in an over-assessment, and, second, that the allocation factors used operate to tax out-of-state property.

(a) *The use of a five year period for determining stock and bond values and for averaging capitalized net earnings is not unreasonable.*

It is obvious that it can make no difference in the long run whether a one year period or a ten year period is used—if the same period is used year after year, the net result will be the same. Mr. Baker testified (R. 147) that "most taxing boards, economists and in fact most railroad men have always adopted the five year period in order to give stability to the tax value so far as the railroad is concerned and also

as far as the State is concerned. As far as the State is concerned stability in assessments are vitally important. As far as the railroad company is concerned it is immaterial whether the five year period or a shorter period is used, as in the long run the total assessment would work out the same."

The railroad contends that, instead of a five year period, the one year period should be used. Of course, the one year during which they would average stock and bond values would be the year 1932—the very bottom of the depression. The average of twenty rails listed in the Dow-Jones & Company averages fell from 189.11 in September, 1929, to 13.23 in July, 1932. The average market price of Great Northern stock in 1932 was $13.20. Yet in the five years ending in 1932, the company had declared dividends totalling $20.00 per share, and the stock had earned $29.81 per share (see Exhibit C, R. 253, and explanation thereof at R. 157).

The same contention is made with reference to the period of time used for determining the capitalized value of the property. Mr. Baker justifies the use of the five year period as follows: "Average earnings for a period of five years preceding the assessment date are usually considered. The use of a single year's earnings as the basis from which to determine the value of a railroad property is seldom, if ever, given serious consideration. A shorter period than five years is sometimes advocated and used, but the generally accepted test period is a five year period. The use of a three year period at the present time, when two of the three years, namely, 1931 and 1932, are the worst years in railroad history in the Northwest since the panic of 1893, in my opinion has but little justification. The railroad plant is still in existence and also its capacity to earn. The use of a three year period by the State Board of Equalization in 1933 could only be justified if the Board had positive proof that the

average earnings of those three years was a correct index of the future. Manifestly no such proof could be produced. I make that statement because as a general policy the five year period had been the period which had been given the same weight by the board for a good many years" (R. 148).

Petitioner's reply to the above is found on page 27, *et seq.*, of its brief. Much attention is given to a detailed statement of how badly the business of the railroad had fallen off during the years immediately preceding 1933, and to estimates made by the general auditor of the railway and other officers as to how little of the old business might be expected to return to the railway after normalcy returns. It cannot be too strongly emphasized at this point that *not one word of this testimony was submitted to the State Board.*

Also, in connection with this argument of petitioner, we are rather surprised to find appended to petitioner's brief in this Court, Appendix A, being purported extracts from the Seventh Biennial Report of the North Dakota tax commissioner to the governor and legislature for the fiscal years 1923 and 1924; Appendix B, being purported extracts from the Tenth Biennial Report of the North Dakota tax commissioner to the governer and legislature for the Biennial Period 1928-1930; and Appendix C, being purported extract from a report of the Committee on Interstate and Foreign Commerce of the House of Representatives recommending passage of H. R. 3263.

These reports are appended to the brief with the explanation (Petitioner's Brief, p. 21) that "These reports are not in the record, but they are public documents of which the courts will take judicial notice." We do not understand that the Supreme Court will take judicial notice of anything not brought to the judicial notice of the trial court, nor do we understand that even the trial court would have taken

judicial notice of these reports. They are not "books kept in any public office," nor are they exemplified or attested in accordance with R. S. 906; Sec. 688, Title 28, U. S. C. A.

There is nothing particularly beneficial to the petitioner in any of these reports, and we have no objection to the Court considering the same if deemed pertinent—but their inclusion in petitioner's brief is but another evidence of petitioner's lack of substantial foundation for its contentions. Petitioner not only insists that the State Board of Equalization should be reversed by the Court because it did not take into consideration matters not presented to it, but now insists that the District Court and the Circuit Court of Appeals should be reversed because of matters not presented to either of such Courts, but presented now, for the first time, in the Court of last resort, as unauthenticated and unproved appendices to petitioner's brief.

So much for the merits of use of the five year period for averaging stock and bond values. We again call attention to the fact that on such questions as the length of the period which should be considered in determining stock and bond values and earnings, the action of the Board, in the absence of fraud, is binding upon the Court. *Illinois C. R. Co. vs. Green*, 244 U. S. 555.

(b) *The use of the five-factor method of allocation of system value does not result in the taxation of out-of-State property.*

Petitioner would have us discard entirely *all* of the accepted bases of allocating system value among the States, except possibly that shown by relative cost of the property, as shown by the I. C. C. estimates of cost of reproduction less depreciation plus additions and betterments. The other

four factors in general use, namely, track mileage, car and locomotive miles, ton and passenger miles, and operating revenues are all attacked upon the ground that their use imports into the State the values of outside property.

This is a new and novel contention, and one which, so far as we have been able to determine, has never been raised before in railroad tax cases except in connection with the track-mileage factor. The argument proceeds upon the proposition that the use of the factor "miles of all track" assumes that every mile on the system is as valuable as every other mile, and that the same vice exists in the use of the other factors above outlined.

Of course, this contention is more or less true as to the track mileage factor, and the use of the mileage of *main* track as a *sole* basis for determining the allocation of railroad values for the purpose of a special excise tax was condemned by this Court in the case of *Wallace vs. Hines*, 253 U. S. 66, cited by appellants.

That case, it will be observed, was before this Court on the allegations of the bill only. It appeared that the State excise tax there under consideration, as administered, required the tax commissioner to fix the total value of the railroad by the total value of its stocks and bonds, and to allocate that total value upon the basis of relative main-track mileage. The principal basis of the decision against the validity of the tax appears to be that no deduction from total value was to be made for stocks and bonds issued upon the security of non-operating property. Of course, for the State to tax such property would be to tax something outside of its boundaries, and property outside of the State can be considered only when it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. That proposition

seems no longer open to argument, and is not, of course, involved here, for, as will be shown later, the computations of Mr. Baker do deduct the value of all non-operating property from the total stock and bond value determined by him.

However, the Court does call attention to the fact that North Dakota is a level State, mainly agricultural, without great markets and distributing centers and valuable terminals, and upon that state of the record, basing its decision on the allegations of the bill "which is all that we have before us," the Court does say: "So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

No evidence was before the Court. Can it be said upon the *facts*, not the allegations of the bill in that case, that the distribution according to *all* track mileage is unjust? Bear in mind that in this case Mr. Baker has used in his computations the factor of *all track mileage*, not *main track mileage*. Main track mileage gives no weight or credit for the hundreds of miles of extra switching tracks, etc., in terminals and at distributing centers. All track mileage gives credit for every foot of every kind of track on the system.

Would this Court in the case of *Wallace vs. Hines* have condemned a mileage prorate under the facts here proven? North Dakota's trackage operated at the end of the year 1932 was 19.96 per cent of that operated on the entire system. During the preceding five years the average mileage of cars and locomotives carrying revenue freight in North Dakota was 20.4% of the system mileage; the total tons and passengers carried one mile in North Dakota was 18.93% of the system total; the gross operating revenues in North Dakota (apportioned to North Dakota on the basis of the miles each particular shipment was hauled—R. 153) were 18.45% of the system total. These three factors, which in-

dicate the use to which the system is being put in North Dakota, clearly contradict the allegations of the bill on which the Supreme Court was passing. The average of the three use factors is 19.14%, as compared with 19.96% for trackage. Then Mr. Baker reduces the grand average by adding in the physical property factor, amounting to 13.84% of the system, which reduces the grand average to 18.34%. (All percentages in this paragraph taken from Exhibit N, R. 273.)

This presents quite a different picture than that before the Court in *Wallace vs. Hines*. Here it is demonstrated that the use of the property in North Dakota corresponds almost exactly with the main track mileage. Here main track mileage is averaged in with I. C. C. cost of reproduction, less depreciation, and the three use factors, to arrive at a composite factor of allocation, the best method of ironing out inequalities yet devised.

Nor did the Court have before it Defendant's Exhibit J (R. 267) disclosing that in 1932 North Dakota carried 378,498 revenue ton miles of freight per mile of track, while the whole system carried only 358,909 revenue ton miles per mile of track, and in 1933 North Dakota carried 449,106 revenue ton miles to 455,059 revenue ton miles per mile of track on the entire system. (See discussion of this Exhibit at R. 165.) Neither did the Court have before it Exhibit K (R. 269) showing that in 1932 the operating revenue in North Dakota per mile of track was 94.73% of the system average, that the tons of revenue freight and the passengers carried one mile were 104.71% of the system average, that the cars and locomotives moved one mile in North Dakota were 103.23% of the system average, and that the composite of these three (operating revenues, car and locomotive miles and traffic units) represented 100.89% of the system

average. (See discussion of this Exhibit at R. 166.) Nor did it have before it Exhibit L (R. 271), disclosing that the operating ratio, that is, the ratio of operating expenses to total operating revenues, in North Dakota for the eight years previous to the assessment was only 62.44% as compared with 67.71% for the system, thus enabling North Dakota mileage, though producing less gross revenue than the average miles of the entire system, to show a greater profit per mile. (See discussion of this Exhibit at R. 166.)

It is true enough that the Courts have rather generally thrown out the track mileage factor when it has been the sole test used, and they have occasionally disapproved the use of it in connection with other factors when the record is clear that this factor produces results grossly disproportionate to the results shown by the use factors. To put it in the language of this Court:

> "Where, as in this case, the evidence requires a finding that the railroad in one of the States reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that State, and the use of that basis as the sole measure for apportionment must be condemned as arbitrary."
>
> *Rowley vs. C. & N. W. Ry. Co.*, 293 U. S. 102, 55 S. Ct. 55.

Now, the figures in that case disclose that Wyoming's percentage of system on the basis of traffic units was only 1.58%, on the basis of use of rolling stock was only 1.65%, on the basis of the average between gross and net operating revenues was only 1.89%. The average of these three use factors combined is only 1.79%. Yet the Court, while disapproving the mileage factor as the sole test, approved the

action of the State Board in averaging in with these three use factors the factor of main track mileage, which gave Wyoming 3.29% of the system.

In the Rowley case, therefore, where it appeared that the main track mileage factor was almost twice the average of the use factors (192%, to be exact), the Court approved its use in combination with the other factors. Compare this with the present case before this Court, where the average of the three use factors used gave North Dakota, for 1933, 19.14%, and the mileage factor used (all-track mileage) gave North Dakota 19.96% of the system. Instead of the mileage factor being 192% of the average of the use factors, as in the Rowley case, here the mileage factor is only 104% of the average of the use factors. If the 92% spread in the Rowley case was insufficient to require the elimination of the mileage factor, how absurd it is to say that the 4% spread in the present case is sufficient to destroy the validity of the mileage factor as a test of relative value! The fact is that the record here shows by far the closest relation between the results of the mileage factor and the use factors of any case we have seen, and the difference between them is so small as to be unworthy of any serious attention.

But appellant would condemn not only the track-mile factor, but the use factors as well, upon the theory that they produce exactly the same results as the mileage factor, and are attended with the same vices as the mileage factor.

The figures shown in the various exhibits in this case for the various factors do come so close together that it would almost seem that the above statements might be justified. But it so happens that the conclusions are clearly wrong, and the only proper conclusion to be drawn from the closeness of the results of the various factors in North Dakota

is that the average mile in North Dakota does just about the average amount of business and uses about the average amount of equipment and brings in about the average amount of gross revenue—in short, that the average mile of track in North Dakota is worth just about the average of the entire system.

For instance: If these use factors are only track-mileage factors under another name, how does it happen that in Wyoming the track-mileage factor gives Wyoming just about twice as large a percentage of the system as the combination of the three use factors gives? (*Rowley vs. C. & N. W. Ry. Co.*, 293 U. S. 102, 55 S. Ct. 55, at page 58.)

Again, the report of *C. & N. W. Ry. Co. vs. Eveland*, 13 F. (2d) 442, at page 444, discloses that the total system value of the railroad there considered was $348,125,629, and the average value per mile $42,423—giving us a total system mileage of 8,200 miles. South Dakota, it is shown, had 1,230.45 miles of the total—so its mileage percentage of the system was 15%. With 15% of the railroad's mileage in South Dakota, the next column of the opinion discloses that the railroad's operating revenues (distributed on a mile-haul basis) from South Dakota were only 4.56% of the system, and that the ton and passenger miles were only 6.90% of the system. If the distribution of railroad gross revenues on a mile-haul basis is merely to use the track-mile factor under another name, how could South Dakota have a mileage factor more than three times the revenue factor, and over twice the ton and passenger mile factor?

We think it is obvious that these factors are not constant, and that in many States they produce greatly disproportionate results. As said by this Court:

> "The value of the property results from the use to which it is put and varies with the profitableness of

that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use."

Cleveland, etc., Ry. Co. vs. Backus, 154 U. S. 439.

The factors of gross operating revenues, ton and passenger miles and car and locomotive miles show to a certainty the use to which the property is being put. They vary in different years as the mileage factor does not vary. They show that miles in one state may receive much less use, and much less revenue, than the average on the system. * * * but that does not happen to be the case in North Dakota.

If we are going to abandon these tests which have been used in allocating railroad values, we might as well abandon the whole system of valuing railroads which has been in use. The basis for taxation is the value of the property.

"It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon value."

Cleveland, etc., Ry. Co. vs. Backus, 154 U. S. 439.

The substance of the theory so urgently relied upon by appellant would be simply this: The only satisfactory basis of allocation of system value is the allocation thereof on a net earnings prorate. But net earnings are not the test of value. It is *property* we are taxing. Why not abandon the whole complicated set-up of arbitrary formulas and computations, and simply say the board shall use its best judgment in arriving at a value of the local property? What better proof could there be of this (if we are to abandon all idea of judging railroad values on the basis of use) than the figure fixed by the Interstate Commerce Commission, which purports to show the cost of the property new, less depreciation, plus additions and betterments? The assess-

ment complained of is $78,832,888. The I. C. C. value as of 1932 was $78,057,633 (Ex. N, R. 273)—or 99.7% of the assessment. The railroad is permitted to fix its rates upon the basis of this investment in North Dakota. If the time has come to abandon the tried and tested methods of valuing a railroad system and apportioning that value on the basis of the use to which the property is put in the various States, then we are satisfied to let the judgment of the Interstate Commerce Commission guide us in determining value.

(c) *The facts upon which petitioner relies to show unfairness in the criticised method were not before the State Board, and the railroad, itself, actually used the criticised method in its brief before the State Board.*

Many pages of petitioner's brief, and many more pages of testimony, are devoted to a discussion of such propositions as the probability of a permanent loss of income for the railroads by reason of other forms of competition; the difference in the weight of rails in North Dakota from that on the balance of the system; the difference in carload weights in North Dakota and elsewhere; a comparison of branch line and main line mileage, tunnels, bridges, grading, snow-sheds, stations, terminals, mountain construction, and various similar matters.

Not one word of this evidence was given the State Board of Equalization. This is all heard, for the first time, when the case came before the trial court. What did the petitioner give the Board of Equalization upon which to exercise its judgment? Exhibit Z-2, at page 295 of the Record, is the brief of the Great Northern Railway Company to the State Board upon the question of its 1933 assessment. It

is a brief which follows the traditional and established line of argument. It does object to the use of the five-year period for averaging stock and bond values and capitalizing net income, but proceeds to show what the railroad contends to be its system value upon a five-year, three-year and one-year basis. But what does it say about expensive mountain construction and terminals and all the other matters now so vigorously presented to show that the five-factor method of allocation is improper? Not one word. It explains the tabulations attached thereto as follows: "This statement shows the proportion of the system value assigned to the State of North Dakota by the use of the composite ratio which gives equal weight to each of the four factors: mileage all tracks operated, car and locomotive mileage, revenue traffic units and gross operating revenues. The North Dakota proportion of the average system value computed as herein set forth is $64,814,280. This amount is $14,035,744 less than the assessed value of this company's property for the year 1932.

"This statement further shows North Dakota's proportion of the system value by use of the composite ratio which gives equal weight to the three factors: car and locomotive mileage, revenue traffic unit and gross operating revenues. This three-factor composite ratio was used as the proper ratio for allocation of system value in recent railway tax cases in North and South Dakota. North Dakota's proportion by the three-factor ratio, 19.14%, is $64,110,870, as clearly set forth in Table I. This amount is $14,739,154 less than the assessed valuation of this company's property for the year 1932" (R. 295).

The above computations refer to the results which would have been produced by allocation of system value based upon five-year averages. The brief then goes on to show

the results of the same method of allocation applied to a system value based upon three-year average, and one year only.

But as to the system of allocation used, the railroad's tax department, instead of objecting to the method long followed by the State tax commissioner in allocating system value, not only adopted and used it, but eliminated from his calculations the one factor, physical property, which Mr. Baker has used, and which materially reduced the composite ratio used in his computations!

It should be said to the credit of Mr. Schoettler, the railroad's tax expert who presented this brief to the State Board, that when he was called as a witness in this case his testimony was limited strictly to his opinion concerning system value and he made no attempt to overthrow the method of allocating system values which he, and all other tax experts, had used (with some minor variations) for many years (R. 79). The railroad's testimony concerning the invalidity of this method of allocation was all supplied by its general auditor, Mr. Turnburke, an able and ingenious statistician and rate expert, but a man who had never in his life appeared before a tax board nor computed nor submitted any statistics for tax purposes, and who did not even know what his company had submitted to the North Dakota State Board or the Board of any other State along the line of the Great Northern for any year (R. 129). His ingenious theory of allocation, by which he would apportion system value in proportion to relative earning capacity of the property in each state, was not presented to the State Board, but was, in fact, developed for use in this lawsuit after the 1933 assessment was made (R. 129).

And yet, upon the basis of evidence never submitted to the State Board, upon the basis of a new and untried theory

of valuation, some of the necessary data for which could not even be secured from any record either in the office of the tax commissioner or the Railroad Commission of this State (R. 136), promulgated by a man not versed in tax matters, opposed to the very method used by the railroad's own tax experts before the Board, the railroad would have this Court say that, if the Board used the method followed with practical uniformity by tax men the country over, and followed by the railroads and the tax commissioner of North Dakota for a long period of years, it used an unjustified and unlawful method of calculation, and its assessment must therefore be annulled.

We insist that the petitioner, by its brief and its evidence before the State Board, is estopped to challenge the method of assessment complained of, even if it were established that such method was used. Surely the railroad should not be permitted to trick the State Board of Equalization into making an over-assessment by presenting all its evidence to the Board upon the basis of the standard methods of calculation of values, and then, after such assessment is made, come into a court of equity and pray for relief upon a new line of argument, a new theory, based upon facts and evidence and conclusions which the State Board was denied the opportunity to study or pass upon. The taxing authorities of a sovereign state are entitled to greater respect than this.

> "This Court must respect in the fullest degree the sensitiveness of Congress in hedging about the sovereign power of taxation by the states, and precluding temporary federal judicial interference with it save in clear cases."
>
> *Chicago, G. W. R. Co. vs. Kendall*, 266 U. S. 94.

We submit, therefore, that there is no proof whatever that the State Board used the method complained of in making

its 1933 assessment; and that even though it were proven that the State Board used this method, it does not result in over-assessment nor in the assessment of out-of-state property; and we vigorously insist that plaintiff is estopped to contend that the method of allocation therein followed is improper or illegal.

E. The Assessing Board Was Not Guilty of Fraud, Either Actual or Constructive.

1. *It is admitted that there was no actual fraud.*

No contention was made before the District Court or the Circuit Court of Appeals, nor is any contention made in petitioner's brief in this Court, that the Board was guilty of any actual fraudulent intent. The only contention is that the evidence concerning the assessment is such as to lead to the conclusion that the Board was guilty of constructive fraud.

2. *The Board was not guilty of constructive fraud.*

We understand that to render the assessment void because of constructive fraud, it must be shown either that it was so grossly excessive as to shock the conscience of the Court, or that it was made as a part of a long-continued system or practice of over-assessment.

(a) *The 1933 assessment was not grossly excessive.*

Petitioner's brief contains many statements which would indicate that the 1933 assessment is shockingly excessive. In the statement of the case at page 6, it is indicated that the true value of the railroad in North Dakota is only $25,000,000, contrasted with the $78,832,888 assessment. It will be observed, however, that in order to reach this re-

markable conclusion, it has been necessary for petitioner to pyramid a series of unwarranted calculations. First, the stock and bond value is taken for only the one year, 1932, which, as hereinbefore set out, clearly did not represent anyone's honest judgment of the value of the underlying properties, but represented instead pure panic psychology. Next, it is said that the State "agrees" that 30.29% represented the value of non-operating assets. It is true this represents Mr. Baker's conclusion, but his testimony and that of the railroad's expert, Mr. Schoettler, both show that this is merely the conclusion of one expert witness, upon a proposition which cannot be determined with any degree of mathematical accuracy.

Next, net earnings are capitalized at 6% for the average of three years (when five years is the standard period) to produce an earnings value of $199,291,550, and the statement is made that future earnings possibilities indicate that there is no reason to expect that the property will ever earn more than *seven* per cent on a system value of $200,000,000. Why 7% is chosen instead of 6% is not explained. Then it is said that less than 1/7 of the physical plant is located in North Dakota, and that this part of the plant had less than average traffic density and originates less than an average amount of traffic, and that a comparison of net earnings indicates that the property in North Dakota indicates that North Dakota had less than 1/8 of the net earning capacity of the system. As hereinbefore pointed out in detail, none of this evidence was before the State Board. But petitioner proceeds to take the system value (arbitrarily arrived at as aforesaid) of $200,000,000 and divide it by eight, producing the so-called "sound commercial appraisal" of $25,000,000.

These figures should be contrasted with the request made

by the railroad when it appeared before the State Board of Equalization at the meeting when the 1933 assessment was fixed: "We respectfully submit that this company is justly entitled to a reduction in its assessment for 1932, and urgently request that the Great Northern assessment be fixed at an amount not in excess of $60,000,000" (R. 300).

So much of petitioner's argument is based upon the new and novel theory offered by Mr. Turnburke, general auditor for the railroad, that we feel we should briefly analyze his contentions.

(1) *The Turnburke theory as to the proper basis for taxable value is not sound.*

At the outset it is worthy of note that Mr. Turnburke does not represent himself to be an expert on tax matters, in any sense of the word. He is the general auditor of the appellant, and has general supervision of reports made to the various State Railroad Commissions and the Interstate Commerce Commission (R. 87). He has never appeared before a Tax Commission, does not know who has appeared, and does not know what basis they used (R. 129). The whole body of his testimony discloses that while he is an able statistician and has had much experience before rate-making bodies, this is his first experience in the field of taxation.

Interesting, also, in this connection, is the fact that appellant did have on the stand a real tax expert. Mr. W. L. Schoettler, the assistant right of way, land and tax commissioner for the appellant, has been with the appellant over 27 years and held his present position since 1925. He handles all reports to taxing officials and attends hearings before Tax Commissions, State and County Boards of Equalization, budget hearings and all matters concerning ad valorem taxes on the Great Northern Railway and its subsidiary companies.

It has been part of his duty for many years to appear before public taxing authorities along the system to discuss assessments and valuation of the various properties, both of the railroad and the physical property of subsidiary companies whose stocks and bonds are owned by the Great Northern (R. 79).

This witness discussed in some detail the method of arriving at *system value*, but counsel very carefully avoided asking him a single question in connection with the method of apportionment. Not one word in favor of Mr. Turnburke's method of allocation could be said by the railroad's own expert who has spent his life in tax work! On cross examination he said, with complete candor, "So far as I have been able to discover, no method has yet been developed which can in an exact and scientific manner fix the true value of the State's share of an interstate railway. In each case all the surrounding facts and circumstances, the conditions and the times and all that sort of thing have to be taken into consideration in order to arrive at a reasonable approximation of true value, as well as the peculiar conditions of each road" (R. 86).

Mr. Turnburke's method of allocating earnings to States may be thus briefly described: He first apportions interstate revenues in proportion to dollars worth of service employed in the transportation, then adds local revenues earned wholly within the State, then deducts expenses incurred in the State to determine the State's net earnings, and finally apportions system value in proportion to the relative earning capacity of the property in each State as thus determined.

This theory does not speak with the authority of a well established method of determining either earnings, by States, or true value. It was used by Mr. Turnburke some ten years ago in a rate case. This is the only use which the records or

the cases show ever to have been made of the theory. It was not submitted to the State Board.

It sounds perfectly plausible and easy to make an exact determination of the proper apportionment of gross revenues on this basis.

The very first step in the calculation, however, requires the ascertainment of something not susceptible of exact ascertainment—it requires the ascertainment of the "average operating cost per ton mile" in each State, and then the average cost per ton mile for the use of plant in that State. An examination of the testimony of Mr. Turnburke and the exhibits offered by him, at least, fail entirely to disclose any accurate or scientific method of discovering this first requirement. Mr. Turnburke's own statement as to its accuracy is as follows: "By working it out on the basis of the total ton miles in each State as I have just described it, I would not get identically the same result for each State to the last dollar and cent that I would get by allocating each individual movement separately, but it would be the same if the revenue for each shipment bore the same relationship to the cost of such shipment. This, of course, is not true as to every shipment as some rates are higher in proportion to cost than are others. However, it is generally true, as pointed out by Mr. Beidelman, that it has been the policy of both the company and the Interstate Commerce Commission to increase rates in the higher cost territory in order to cover the increased cost and while there may be individual rates that are higher or lower than others in proportion to the net or in proportion to the cost, thus giving a different net, I believe that when you take the total traffic of all kinds passing through any one State we will find that the total revenue bears about the same relationship to the total cost in all cases" (R. 89).

Compare this with the testimony of Mr. Beidelman, freight traffic manager of the Great Northern (R. 65), when he says: "It is true today that transcontinental rates are fixed almost entirely upon a competitive basis with the Panama Canal and without regard to expenses of operation in various States; that is, we make them as low as we can and still have some profit over and above what we estimated to be our *out-of-pocket* cost."

Mr. Baker lists the objections to Mr. Turnburke's formula as follows: It assumes an idealistic rate structure, in which all rates are based upon cost of service, including a percentage return upon the cost of the property. It gives no weight to the character of the traffic in any State, whether the traffic is high grade or low grade traffic. It spreads out over the entire system all the revenue from traffic which is confined to the two States of North Dakota and Minnesota. It is based in part upon the theory that rates are everywhere adjusted to costs of service, whereas rates are largely fixed on a competitive basis, the rates on all commodities are not the same, rates being fixed according to the value of the commodity carried to a greater extent than they are on the cost of service (R. 188).

That the theory, founded, as it is, upon the hypothesis that railroad rates are based upon cost of service plus a reasonable rate of return on the investment, is unsound, is, we believe, clearly demonstrated by the authorities.

The entire history of freight classification demonstrates that relative freight rates have not been based upon the fair proportionate cost or the value of the service alone or in combination.

Atchison, T. & S. F. Ry. Co. vs. U. S., 203 Fed. 56 (aff'd in 231 U. S. 736).

The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and has often been remarked.

Northern Pacific Ry. Co. vs. State of North Dakota, 216 U. S. 579.

The company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a rate at which some such part would be unremunerative.

St. Louis & S. F. R. Co. vs. Gill, 156 U. S. 649.

The reports of the Interstate Commerce Commission are replete with decisions approving special rates which pay only the "out-of-pocket" costs. See, for instance:

Reduced Commodity Rates to Pacific Coast, 89 I. C. C. 512.

Lumber Rates from the Southwest to Points North, 29 I. C. C. 1.

We submit that the theory submitted by Mr. Turnburke is more unfair and unreliable than the methods of ascertaining value which have long been in use, and that it requires more arbitrary assumptions not warranted by the facts.

(2) *Assessment of interstate railroads is not an exact science, and all formulae are mere approximations of actual value.*

We feel that the general analysis of the various and sundry formulas and methods which have been developed by taxing authorities and experts for the assessment of railroads, as given in frank detail by Mr. Baker, set forth on pages 144 to 155 of the transcript, presents about as clear and comprehensive picture of the whole field of railroad taxation as could

possibly be given within the range of ten short printed pages. Here Mr. Baker, a specialist in tax matters for the past 21 years, deputy tax commissioner of North Dakota for 13 years, and for the past two years engaged in special tax work as a "tax specialist" (R. 144), with complete candor, discusses the various methods of arriving at a valuation for railroads, and frankly points out the merit or lack of merit of each. As this is the only place in the entire record where any statement of these underlying principles is found, we especially recommend these ten pages to the consideration of the Court.

We do not propose to burden the Court with a re-statement of Mr. Baker's testimony. We point out merely that at every step of the way assumptions have to be made of facts which are not subject to exact determination, and that any formula or method must, of necessity, be but an approximation of true value. For instance:

The first step in valuing a railroad is to determine the value of the entire system (R. 145). This is usually accomplished either by determining the total market value of its stocks and bonds, or by capitalizing the net earnings of the railroad, or by a composite of the two.

Here at the very outset we find the necessity of making an arbitrary determination: Shall we take the stock and bond value as of April 1, the assessment date? Shall we average it over a period? If so, how long a period should be selected? The statistician having made his choice of the above arbitrary alternatives, then sets down his market value of stocks and bonds (or average value over a period) as the actual value of the railroad system. But assuming the correct period has been used, is this necessarily true? Is it not, in itself, an arbitrary assumption? Is market value of stocks and bonds an absolute criterion of the value of a property,

particularly in times like these? When the total market value of all common and preferred stocks listed on the New York Stock Exchange fell from eighty-nine and one-half billion dollars in September, 1929, to fifteen and one-half billion dollars in July, 1932 (R. 147)—three years next preceding this assessment—how much weight can we give to stock values? When the average of twenty railroad stocks fell in the same period from 189.11 in September, 1929, to 13.23 in July, 1932 (R. 147), does this, on the face of it, represent the considered judgment of the investor as to the value of the railroad, or does it reflect, instead, the panic conditions which have seized upon us? Can it be that the aliquot portion of a railroad represented by one share of stock has dropped in these three years from $189 to $13? To ask the question is to answer it. Probably neither $189 nor $13 represents the true value of that share of the railroad, and to assume that an average of the two represents the true value is again to make an arbitrary assumption, not based on any demonstrable fact. All this uncertainty is developed at the very first step of our computations.

The next step is to subtract from the average market value of stocks and bonds, the value of the non-operating property, which is otherwise taxed, and therefore not to be included in the taxable valuation which we are attempting to reach. How do we go about ascertaining this value? Once more by arbitrary methods. Mr. Schoettler, the deputy land, tax and right of way commissioner of the Great Northern, would have us capitalize the income of some of the non-operating property, would have us accept the assessed valuation as fixed by various State authorities for other property, and would have us accept his estimate of the value of still other non-operating property (Ptfs. Ex. 8, R. 233). Any one of these methods of ascertaining value is arbitrary in itself, and cer-

tainly the selection of the various items which must be valued by the various methods is arbitrary. Mr. Baker attempts a more scientific method. He attempts to assign to non-operating property its relative share of the stock and bond value as measured by relative investment and relative earnings, giving 50% weight to investment and 50% weight to earnings over a period of years (Ex. I, R. 162). But the determination of the period of years to be used, the rate at which earnings should be capitalized and the weight to be given to investment and to earnings, all, again, are arbitrary.

And so it goes throughout the whole course of any computation of railroad values. No one of the factors used for allocation of system value among the States is exact—if it were, there would be no need of using any others. This is true concerning the method of apportionment contended for by the railroad as well as that contended for by the State's witnesses. See Mr. Schoettler's frank statement at page 82 and again at page 86 of the abstract. A mistake in judgment early in the computations is apt to result in the pyramiding of a minor error into a gross error at the end, as is exemplified by petitioner's calculations at pages 5 and 6 of its brief. As was well said by this Court:

> "The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property."
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> *Rowley vs. C. & N. W. Ry.*, 293 U. S. 102, 55 S. Ct. 55, No. 9, decided Nov. 5, 1934.

No further argument is required to demonstrate that the Board of Equalization is not bound by law to accept the results of any formula devised by a tax expert, however capable and honest, but on the contrary it would be a violation of the Board's duties to do so.

(3) *Use of the standard methods of allocation of system value to the State of North Dakota produces results approximating true value.*

As we have said before, no method has ever yet been devised to give an absolutely accurate yardstick for the measurement of the value of that part of an interstate railroad lying within any given State. The best that can be hoped for from any system is an approximation. Yet

> "It will not do to say that the valuation of a piece of property is mere guess-work. True, it is often largely a matter of opinion, and mathematical exactness is not always possible. Various elements enter into and affect an opinion respecting the value of a given piece of property, and all that can be required is that the assessing board exercise an honest judgment based upon the information it possesses or is able to acquire. That valuation is of the property as a totality, and it is unnecessary in making an assessment to disintegrate the various elements which enter into it, and ascribe to each its separate fraction of value. Oftentimes the combination itself is no inconsiderable factor in creating the value."
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> *People ex rel. Brooklyn City Railroad Co. vs. State*, 199 U. S. 48.

There is no good reason to suppose that the methods of allocating system value among the States which have stood the test of time, which have been approved by tax experts,

taxing commissions and courts alike throughout the entire country, should suddenly lose their validity. Of the nine methods discussed by the committee of The National Tax Association in its report of 1923, the State tax commissioner and the railroads alike have used track mileage, physical property, car and locomotive miles, ton and passenger miles, and operating revenues, or some of them or some combination of them for many years in computing North Dakota assessment (R. 151). Mr. Baker, in his exhibits, shows how these various factors of allocation work out. He has not confined himself to any one system, but has given the Court the benefit of calculations upon various combinations of these factors (Exhibits P and Q, R. 277 and 278).

The principle that the system value of an interstate railroad should be allocated among the States on the basis of factors reflecting the use of the property in the various States has long been recognized. Some of the cases have approved allocation on the basis of miles of track, others have recognized allocation on the basis of various other factors. No case has ever disapproved the use of the five-factor method recommended by Mr. Baker as the fairest one, nor any comparable method.

Rowley vs. C. & N. W. Ry., 293 U. S. 102.
Chicago, B. & Q. R. Co. vs. Babcock, 204 U. S. 585.
Louisville & N. R. Co. vs. Greene, 244 U. S. 522.
Southern R. Co. vs. Kentucky, 274 U. S. 76.
Erie R. Co. vs. Pennsylvania, 21 Wall. 492.
Pittsburg, C. C. & St. L. R. Co. vs. Backus, 154 U. S. 421.
Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S. 18.
Cleveland, C. C. & St. L. R. Co. vs. Backus, 154 U. S. 439.
Illinois C. R. Co. vs. Greene, 244 U. S. 555.
Chicago, N. W. Ry. Co. vs. Eveland, 13 F. (2) 442.

We believe that the history of the assessments of the Great Northern for the past seventeen or eighteen years demonstrates that the State Board has dealt with the Great Northern Railway on a fair and equitable basis. Defendant's Exhibit O. R. 275, discloses that since 1917, when a decree of the District Court of the United States established the true value of the Great Northern property in North Dakota (R. 171-2), reductions totalling $19,661,884 have been made—practically 20%—in the assessed value of the Great Northern. It was reduced over 8% in 1918, over 4% in 1919, 5% in 1921, increased 1.25% in 1929, and again reduced .35% in 1931, 5% in 1932 and .02% in 1933. While it appears that none of these assessments were the result of the adoption of any formula or method of calculation, the formulas and calculations of the tax commissioner and the railroads, based upon standard formulas, were before the Board, and the assessment as made apparently approximated the results of some of these formulas.

As late as 1933, when the Great Northern appeared before the Tax Board to assist in ascertaining the amount of its 1933 assessment, the railroad had not yet discovered anything wrong with the accepted methods of valuation and apportionment, and, in its brief submitted to the Board, it used and urged the use of the standard methods hereinbefore discussed—its only argument being that the period of years over which the figures should be averaged should be shortened.

(4) *The State Board was justified in leaving the 1932 assessment unchanged in 1933.*

Assuming the 1932 assessment to have been lawful and justified by the evidence (which appears to be a fair assumption in view of the presumption of regularity of official acts,

the fact that the railroad made no objection to the 1932 assessment, and the fact that no wrongful method is shown to have been used by the Board) we think that the exceptional circumstances present in the summer of 1933 were sufficient to justify the Board in letting the 1932 assessment stand for 1933.

The basis for the use of the standard formulas has been that they represented the best method by which the value of a railroad could be *figured out*, rather than estimated. But when a situation confronts the Board such as existed in 1933, would not reasonable men have doubted the validity of figures based upon stock and bond values and capitalized net earnings? Mr. Baker describes the situation (all too well known to all of us) as follows: "The depression resulted in a collapse in the stock and bond market. The forced selling that occurred during the recent depression brought stock and bond values down to a figure where, in the opinion, I think, of most of the investors, it did not fairly represent the value of the property. The purchasing power of the dollar from 1929 to 1933 very greatly increased and this resulted in a very great depreciation in security prices as well as the prices of all commodities. In the United States there was a general movement to convert property into cash, due to a collapse in public confidence, and security prices since 1929 have been extremely unstable. Some of the things that affected the security market were the exportation of gold, the policy of the Federal Reserve Banks, the collapse of the speculative bubble, the freezing of banking assets, the wide-spread failure of banks and the almost total loss of confidence on the part of the public in the integrity of American business managements. In North Dakota, in addition to the general depression, we have had drought and crop failure and ruinous prices for agricultural

products, and from 1929 to 1933 the extraordinary rise of the dollar in relation to commodity prices resulted in a universal rush to convert securities and other property into cash. The forced sale of securities, and the deposit of collateral for bank loans aggravated the decline" (R. 147).

Would a Board necessarily be unreasonable under these circumstances if it said: The situation this year is so bad that we cannot rely upon the validity of any of these figures. The assessment last year (1932) seemed fair, at least the railroad did not attempt to stop it. It was in general accord with the assessments of previous years. The railroad is still there. The trains are still running about as before. The railroad must still have, as a matter of fact, about the same market value it had last year. We will simply take last year's assessment, subtract enough to take care of the decrease in mileage, and let the 1932 assessment stand.

We do not say that this is what the Board did, for we do not know. But would that be, of necessity, arbitrary or fraudulent under the circumstances existing at the time of the assessment? As a matter of fact, we all know that is the way local assessors value most local property. They come in, look around, ask if you have anything new since last year, and put down the same figure they had last year. A store building is valued the same year after year, even when it is unoccupied—its value is not wiped out simply because it has had no earnings. We submit that in the unprecedented crisis before it, the fact that the Board adopted the assessment for the previous year (which is not admitted nor proved in the record) would not of itself be evidence of arbitrary or unreasonable conduct. Instead, it would be the application of common horse-sense, instead of the application of technical and arbitrary accounting formulas, to

the valuation of a railroad. While, as a general practice, the horse sense judgment method would probably be improper, we submit that *judgment* is what the Board is required to use, and that under the conditions existing, such a method, for a year or two, might be very honest, and very good, judgment.

We think the Board had the right, also, to consider that to follow any strict formula, based on stock and bond values and net earnings, would be to discriminate against other business properties under the prevailing conditions. Let us again quote Mr. Baker's excellent analysis of this situation: "The assessment of general property in North Dakota has not been reduced in conformity with the drastic and decreased economic return from the property and could not be so reduced without so drastic a reduction in revenues as to endanger the continuance of the functions of government. The State Board of Equalization of North Dakota in my opinion could not grant to the owners of railroad property a drastic reduction in value without gross discrimination against other property owners in much greater economic distress. I think the mere fact that the securities representing a certain class of taxable property are quoted on the market, its earnings are readily available and that consequently changes in the market value of such property may be readily ascertained, does not entitle such property to preferential treatment by a State Board entrusted with the duty of equalizing property values so that taxes shall be equitably distributed according to the market value of all classes of property. Assessing officials and equalizing boards during the last several years have been confronted with a very difficult situation. Values which had been more or less stable for a generation have melted rapidly away. If all assessments had been reduced to conform to

actual market value the State and its subdivisions would have ceased to function, as the revenue would not even approximate necessary expenses. Farm property constitutes about 65% of the total taxable value of North Dakota. An economic return from such property as will be shown in exhibits which I have prepared (Exhibits U, V, W, X, Y, Z and Z-1, R. 287, 289, 290, 291, 292, 293, 294), has decreased about 75% compared with the 1924-1928 average. Interest and taxes and cost of operation undoubtedly have exceeded the gross income by a large margin, leaving nothing for the support of the family or a return on property. Under such conditions in order to equalize the tax burden in conformity with the value of all classes of property, capitalization of five year average net railway operating income at six per cent in my opinion would result in giving preferential treatment to the railroads as compared with other property owners" (R. 149-150).

We think this analysis speaks for itself, and demonstrates the utter unfairness of which the Board would have been guilty had it, in 1933, based its assessment of the railroad strictly upon some formula depending for its computation upon figures and rates arbitrarily assumed to reflect the true market value of the property.

(5) *Assuming the 1933 assessment to have been erroneous in amount, the error is not one which the Court should attempt to correct.*

The Court is here called upon to determine something which is most difficult of ascertainment. The test of the legality of this assessment must lie in the honest judgment of the Board of Equalization. This Board consists of the governor, state treasurer, state auditor, commissioner of agriculture and labor and the state tax commissioner. Sec.

2141, *1925 Supplement to Compiled Laws of N. D.* It is definitely and strictly a lay-board. No qualifications concerning tax knowledge or experience are imposed by law upon any member. The actions and conduct of such a Board are not to be judged by any fine standard of technical nicety. The attitude which Courts must take toward such Boards is well expressed by Mr. Justice Holmes:

> "The members of the Board were called, including the governor of the State, and submitted to an elaborate cross examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or an umpire, if we assume that the members of the Board were not entitled to the possibly higher immunities of a judge. * * * Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. * * * All the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law.
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> "But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth. The Board was created for the purpose of using its judgment and its knowledge."
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> *C., B. & Q. R. Co. vs. Babcock,* 204 U. S. 585.

Judged upon this standard, was the action of the State Board of Equalization unreasonable or arbitrary?

The standard methods of determining system value which had been before the Board for years, submitted by both the tax commissioner and the railroads, had proceeded upon the theory that actual market value of the railroad system could be determined by the average market value of its stocks and bonds, or the capitalization of its net income, or a composite of the two.

Considering the first method—stock and bond value—the Board was confronted with the fact that there existed an unprecedented depression, the like of which had never been seen before, and which brought railroad stocks and bonds to the lowest point in half a century.

Could not reasonable men, honestly exercising their judgment, have concluded that these figures for 1931 and 1932 had lost much of their probative significance? Was it not reasonable to suppose that stock and bond values represented, under existing conditions, nothing but panic psychology and speculation? The reason for the use of stock and bond values as a test of system value is that it is supposed to represent the considered judgment of investors as to the actual worth of the share of the railroad which they were buying. But is it not a matter of common knowledge, which the Board could well consider, that investors were not buying stock on any basis of considered judgment of worth, but rather that holders of stocks and bonds, during the first few years of the depression, were rushing to liquidate their investments? The railroad complains bitterly that Mr. Baker did not give more weight to the last year or two of stock prices than for the previous years. But could not the Board have reasonably said that a share of stock which paid $5 in 1928, $5 in 1929, $7.50 in 1930 and $2.14 in 1931

—a total of $19.64 in the preceding five years—was worth more than $13.20? (Exhibit C, R. 253.) Would it not have been reasonable for the Board to have gone back and taken a longer period of years—say seven, or ten years—in order to arrive at the settled state of things, and not give too much weight to stock and bond prices which all men knew did not represent anyone's considered judgment as to actual value of the property underlying the securities?

> "At present, and during the years in question (1929 and 1930), the stock market reflected the hopes or fears of a speculating public more accurately than the taxable values of roadbed and equipment."
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> *Pleasant vs. Missouri K. T. R. Co.*, 66 F. (2d) 842, 847.

Appellant complains that, according to the testimony of Mr. Beidelman, the future of the railroads, and particularly of the Great Northern, is very dark, and that therefore much greater stress should have been placed on later years' values than on earlier years. But the dark prophecies of Mr. Beidelman were not before the Board. He is heard from for the first time at the trial of the action. Could not reasonable men have supposed, in the absence of clear and convincing evidence (let alone the absence of all evidence) to the contrary that the railroad would come back with good times?

The next step in connection with the stock and bond method was to deduct non-operating property values from the total, as the non-operating property is otherwise taxed. Mr. Schoettler gives us Exhibit 8 (R. 233) to show us what these deductions should be. Items 1, 2, 4, 5, 8, 9, 10, 11, 12 and 20 he lists at their "assessed valuation"—as assessed by local taxing authorities. Items 2, 6, 7, 13, 14, 15, 16,

17, 18, he lists at a value arrived at by capitalizing earnings at 6%. Item 19, he simply estimates the value. Stocks and bonds alike he capitalizes at 6%. As stated by Mr. Baker: "A man buying property, an entire property, would probably be satisfied with a return of six per cent on his investment. If he bought all the bonds of that property he probably would be satisfied with a return of four and a half or five per cent, but if he bought all the stock of the property, where he is taking a greater speculative risk, he would demand a larger return, and in my opinion, seven per cent would be a more correct rate to use in the capitalization of common stock dividends to ascertain value" (R. 163). Item No. 5 of this Exhibit 8 would seem peculiar on the face of it. Mr. Schoettler would deduct the assessed valuation, $1,723,892, of the property of the Dakota and Great Northern Townsite Co., when the Great Northern owns stock of a par value of $50,000, and a book value of only $25,000? With reference to Item No. 10, Mr. Baker says: "Item 10 shows the investment of the Great Northern in Spokane, Portland & Seattle Railway Company stock and bonds. The Great Northern owns half the stock and half the bonds. The assessed valuation of the underlying properties back of the stock and bonds is listed as a proper item of deduction as to the Great Northern one-half interest. Well, now that property has been a very unproductive property as far as being an investment is concerned. It has paid its bond interest very irregularly for a long period of years and I believe never has paid a dividend on the stock and I think if the income from that property for the last five years were capitalized the Great Northern share of that income valuation listed would be around between five and six million dollars, using the six per cent rate of capitalization, in comparison with the $20,000,000 set up in Mr.

Schoettler's statement" (R. 163).

Mr. Baker, in his Exhibits D, E, F, G, H and I (R. 255, 257, 259, 265), has valued the operating property by assigning to non-operating property its relative share of stock and bond value as measured by relative investment and relative earnings over a period of years. For Mr. Baker's analysis of this method, see R. 157 to 162. He thus assigns $155,685,389 (Exhibit I) to non-operating property, as compared with Mr. Schoettler's figure of $182,235,186 on Exhibit 8 (R. 233). Surely the Board was justified in accepting a value of non-operating property similar to that arrived at by Mr. Baker's computations, especially when there are no generally accepted standards by which the value of non-operating property is to be determined (R. 162).

The next step is to determine system value by capitalizing income. What rate shall be used? How long a period shall be considered? On these and similar matters the action of the Board is binding upon the Court.

Illinois Central vs. Greene, 244 U. S. 555.

Defendant's Exhibit P (R. 277) shows the results which would be secured by capitalizing at 6% on the 5 year average. Exhibit Q (R. 279) shows the results of capitalizing at 5%—resulting in a higher valuation. Mr. Baker thinks that in a year such as 1933, when no property is earning a fair rate of return, the capitalization might very fairly have been made upon a 5% basis instead of six (R. 176). This 1% difference in the rate makes a difference of 66 million dollars in the total value arrived at, and brings the computation by the usually accepted methods very close to the assessed valuation made by the Board, even when combined into a composite factor with the stock and bond value.

We regret that it is impossible for us to analyze all the

evidence presented to the District Court, for it would run this already lengthy brief into lengths beyond all reason, but we believe that a reading of the record will satisfy the Court that reasonable men, acting honestly as public officials, but without any specialized knowledge of tax theories and economics, could well have determined the assessment of $78,832,888 to be as nearly accurate a statement of value as could be placed upon any such property.

(6) *Even if there was an over-assessment for 1933, it was not part of a continued practice of over-assessment.*

We need make no extended argument upon this feature. The decisions hereinbefore referred to, and particularly the language of Chief Justice Taft in *Taylor, et al., vs. Louisville & N. R. Co.*, 88 Fed. 373, have made it clear that occasional or sporadic cases of over-assessment cannot be remedied by the chancellor.

Exhibit P. R. 277, presents for the Court's consideration, all of the customary methods of determining railroad values and the allocation thereof among the States. These computations show, for instance, that if the Great Northern value were to be allocated solely on the basis of the so-called "use factors" its assessment for 1929 was 101.06% of true value, for 1930, 96.11%; for 1931, 96.59%; for 1932, 99.93% and for 1933, 119.32%. Adding the miles of all track factor to the three use factors, shows an under-assessment for each of the four years preceding 1933. Adding, instead of "all tracks" the factor of tracks actually owned or leased and operated (excluding 1,000 miles of track operated only under trackage rights owned and maintained by other companies) we find again an under-assessment for each of the four years preceding 1933. Adding in the physical prop-

erty factor, we find assessments amounting to 105.41%, 99.82%, 100.41%, 104.29% and 124.52% for the years 1929, 1930, 1931, 1932 and 1933, respectively. Incidentally, cost of reproduction, according to Mr. Schoettler, appellant's tax expert, is only one of the proper factors and may be not the most important one (R. 82). He did not use it in his brief submitted to the State Board in 1933 (R. 295, Exhibit Z-2).

If we turn to the next exhibit, Exhibit Q (R. 279) where net railway operating income is capitalized at 5% instead of 6%, we find that by whatever means of allocation we use, we get an under-assessment for every one of the four years preceding 1933.

It requires no further argument to demonstrate that the 1933 over-assessment (if it was, in fact, an over-assessment) was but a "sporadic case," and not the result of a wrongful course of conduct.

F. Plaintiff Has Failed to Do Equity in This Case.

Paragraph I of the defendant's Answer is a plea to the jurisdiction of the Court, and asks that the Court do not take jurisdiction of the cause of action alleged in the Bill of Complaint for the following reasons: * * * "F. That the plaintiff has a full, complete, speedy, and adequate remedy at law and that this Court is without jurisdiction to determine this matter in controversy because of lack of equity."

The petitioner has tendered and paid only 60% of the taxes levied pursuant to the challenged assessment. As low figure as sixty per cent could be reached only by the use of a new and untried theory of valuation. It is undisputed that no such method was ever presented to the Board

in this matter or any other. In fact, this method has never been used by any railroad or Tax Commission so far as any of the witnesses knew and it was prepared subsequent to the making of the assessment. There is grave doubt as to the verity and usefulness of the proposed method (see Opinion of the Court below, at page 316 of the record). In its brief before the State Board, petitioner asked "that the Great Northern assessment be fixed at an amount not in excess of $60,000,000." The assessment was fixed at $78,832,888. The tender and payment of the petitioner was on the basis of an assessed value of $47,000,000, some $13,000,000 less than the assessment requested of the State Board by the petitioner. Reduced to taxes, the petitioner has tendered and paid nearly $300,000 less than would have been payable upon the basis of the assessment of $60,000,000 requested by petitioner. We believe this discloses an entire failure on the part of the petitioner to do equity in the premises, and should deprive the petitioner of any recourse in a court of equity.

CONCLUSION.

We respectfully submit that the District Court and the Circuit Court of Appeals were right in their conclusion that the record showed no abuse of discretion on the part of the State Board of Equalization, and that the determination of the State Board upon the evidence before it, and the determination of the District Court upon the evidence before it, are sound and should not be disturbed.

Dated November 25, 1935.

Respectfully submitted,

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APPENDIX.

Constitutional and Statutory Provisions of the State of North Dakota Fixing the Power and Duty of the State Board of Equalization.

Section 179, *Constitution of North Dakota:*

"All taxable property, except as hereinafter in this section provided, shall be assessed in the county, city, township, village or district in which it is situated, in the manner prescribed by law. The property, including franchises of all railroads operated in this State, and of all express companies, freight line companies, dining car companies, car equipment companies, or private car line companies, telegraph or telephone companies or corporations operating in this State and used directly or indirectly in the carrying of persons, property or messages, shall be assessed by the State Board of Equalization in a manner prescribed by such State Board or Commission as may be provided by law. But should any railroad allow any portion of its railway to be used for any purpose other than the operation of a railroad thereon, such portion of its railway, while so used, shall be assessed in a manner provided for the assessment of other real property."

Section 2141a3, *1925 Supplement to Compiled Laws of North Dakota:*

"All property, real or personal, belonging to railroad, street railroad, telegraph, telephone, express, sleeping car, dining car, freight line and car equipment companies and used exclusively in the operation and maintenance of its lines or routes in this State and lines for the transmission of electric current, shall be assessed

for the purpose of taxation by the State Board of Equalization and not otherwise except in case of any such property as is now or may hereafter be made subject to a gross earnings tax in lieu of a property tax."

Section 2122, *1925 Supplement to Compiled Laws of North Dakota:*

"All property subject to taxation shall be assessed at its true and full value in money. In determining the true and full value of real and personal property the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price at which said property would sell at auction or at forced sale or in the aggregate with all the property in the town or district, but he shall value each article or description of property by itself and at such sum or price as he believes the same to be fairly worth in money. In assessing any tract or lot of real property the value of the land, exclusive of improvements, shall be determined; also the value of all taxable improvements and structures thereon, and the aggregate value of the property, including all taxable structures and other improvements, excluding the value of the crops growing upon cultivated lands. In valuing any real property upon which there is a coal or other mine or stone or other quarry, the same shall be valued at such a price as such property, including the mine or quarry, would sell at a fair voluntary sale for cash."